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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 363

LYNCHBURG TRAFFIC BUREAU,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

This suit was filed on January 21, 1949, in the United States District Court for the Western District of Virginia, by the Lynchburg Traffic Bureau, against the United States of America. The purpose of the suit was to have a special court of three-judges to hear our petition and then to set aside, annul and forever enjoin the Interstate Commerce Commission from enforcing the provisions of its report and orders of November 10, 1948 and January 3, 1949, entered in a proceeding before the Interstate Commerce Commission, known as Docket 29677, Minimum Rates on

Rail Traffic Between the North and the South, reported at 273 I. C. C. 33. The reasons these orders should be set aside, annulled and the enforcement of them forever enjoined, we believe, are: that the rate-making power of the Interstate Commerce Commission has been apparently unintentionally used so as to build up one community (Danville) or territory (Southern) and to destroy another community (Lynchburg) or territory (Official) by giving Danville more favorable terms and conditions on which to purchase transportation service than the terms and conditions given Lynchburg; that the orders of the Commission allowing the carriers authority to maintain minimum rates nullify the provisions of Sections 1, 2, 3, and 4 of the Act (49 USCA); and that the orders permit the carriers to give Danville *Free Transportation Service* and require Lynchburg to pay for transportation service based on the actual distance each shipment moves. As an example, on shoes, prior to September 1, 1940, the rate was 120 cents per 100 pounds at Danville and 111 cents per 100 pounds at Lynchburg to and from New York and, on September 1, 1940, the rating was reduced to Danville but not changed to Lynchburg. This reduction in rating disturbed the rate competitive relationship between Danville and Lynchburg. The decision of the Commission, which was sustained by the Court, allows the carriers to charge Danville the rate to Lynchburg of 111 cents as the minimum rate at Danville, thus permitting Danville to purchase transportation service on more favorable terms and conditions than those on which Lynchburg must purchase the same transportation service. Equal terms and conditions would permit Lynchburg and Danville to purchase transportation service on shoes for 111 cents at Lynchburg and 120 cents at Danville, or 78 cents at Lynchburg and 84 cents at Danville, to and from New York. Consequently, when Danville purchases

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transportation service at the price that Lynchburg pays (111 cents), then Danville is purchasing transportation service on more favorable terms and conditions than those given Lynchburg.

The jurisdiction of the three-judge district court rests upon the provisions of the Acts of Congress approved June 25, 1948 (c. 646, 62 Stat. 869) Sections 2284 and 2325, Title 28, United States Code, "Judiciary and Judicial Procedure".

The decision of the Interstate Commerce Commission here considered, which holds, by permitting minimum rates to be maintained, that Danville is entitled to purchase transportation service on more favorable terms and conditions than those on which Lynchburg is entitled to purchase the same transportation service is a decision of the kind that is to be heard and determined by a district court of three judges. Consequently, the decision of the court in this proceeding is the kind of a decision from which an appeal to the Supreme Court is allowed by Section 1253, Title 28, United States Code, "Judiciary and Judicial Procedure". The jurisdiction of the Supreme Court of the United States over this suit on appeal is allowed by Section 1253, Title 28, United States Code, as that section provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This is a suit that must be heard and determined by a district court of three judges, as Section 2325, Title 28, United States Code, provides as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or

in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title."

Then, Section 2101, Title 28, United States Code, provides, in part, as follows:

"(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part, any act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. * * *

"(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree appealed from, if interlocutory, and within sixty days of final."

The decision and order appealed from were rendered and entered on the 30th day of June 1949 and the petition for leave to take an appeal, with assignment of errors, was filed on August 26, 1949, or filed within the sixty day period allowed by Section 2101 (b), Title 28, United States Code.

The district court, we believe, erred as a matter of law in refusing to grant the prayer of plaintiff for an order annulling, setting aside and forever enjoining the report and orders of the Interstate Commerce Commission dated November 10, 1948 and January 3, 1949, on the ground that said orders, as plaintiff alleges, are unlawful and contrary to the Interstate Commerce Act (49 USCA).

The decision of this court in this proceeding should be reviewed by the Supreme Court of the United States, as this proceeding involves, among other things, the question of whether or not the Commission can authorize the car-

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riers to establish and maintain rates that create unjust discrimination and undue preference; can use its rate-making power so as to build up one community or territory and destroy another community or territory; can make rates so as to give one community or territory more favorable treatment with respect to transportation charges than it accords another community or territory; can give more favorable terms and conditions of transportation to one community or territory and withhold the same kind of terms and conditions from another community or territory on the premises that the more favorable terms and conditions can be granted by use of minimum rates under Section 15(1), Title 49 USCA; and whether or not the Commission can, before or after the carriers have published rates and charges that violate Sections 1, 2, 3, and 4 of Title 49 USCA, grant the carriers authority that has the force and effect of repealing Sections 1, 2, 3, and 4 of Title 49 USCA.

Then, too, we believe, since the decision permits more favorable terms and conditions of transportation to be given Danville than those given Lynchburg on the same articles, that the decision may be contrary to the principle announced in the decision of the Supreme Court in Union Pac. R. Co., et al. v. United States, et al., 313 U. S. 450, (462), where the Court, in part, said:

> "Violation of the Commerce Act through receipt of advantage is to be treated by actual results not by intention. Any and all means to accomplish the prohibited end are banned. * * * In fact favoritism which destroys equality between shippers, however brought about, is not tolerated."

The decision appealed from, we believe, is contrary to law, as that decision sustains the use of minimum rates to accomplish the purpose set forth by the Commission in

Minimum Rates on Hay, etc., (152 I.C.C. 355 (358)), as follows:

> "*The necessity for minimum-rate* provisions in connection with rates on hay and allied commodities seems to be as clear as it is in the case of class rates generally, * * * *in order to avoid wholesale fourth-section departures over direct routes for which there could be no justification and to prevent undue prejudice to and preference of points on and near the border.*" (Emphasis added.)

But that kind of use of minimum rates may be contrary to the proper use of minimum rates mentioned by the Supreme Court in New York v. United States, 331 U. S. 284 (346), where the Court, in part, said:

> "These cases, to be sure, recognize the power of the Commission so to fix minimum rates as to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them."

Consequently, since minimum rates of the kind here considered have been used to give Danville more favorable terms and conditions on which to purchase transportation service than those given Lynchburg, minimum rates of the kind here considered are unlawful as they are not used to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them—but, on the contrary, they have been here used so as to build up one community (Danville) and to destroy another community (Lynchburg) by permitting Danville to purchase transportation service on more favorable terms and conditions than those on which Lynchburg must purchase the same transportation service. Following the decision herein, suggests that Lynchburg should have the rates applicable to a point 64 miles north of Lynchburg.

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The decision appealed from is contrary to law, as it sustains the proposition that the Commission can use its power to fix minimum rates so as to make minimum rates supersede the provisions of Sections 1, 2, 3, and 4, Title 49 USCA.

The decision appealed from is contrary to law, as it sustains the proposition that the Commission can use minimum rates to avoid fourth-section departures for which departures there could be no justification and to prevent undue prejudice to Lynchburg and undue preference to Danville, which departures, preference and prejudice, were created by the more favorable terms and conditions of transportation given Danville and withheld from Lynchburg.

The report of the Commission which is here involved specifically shows that the rates and charges the carriers maintained were rates and charges that violated Section 4 of Title 49 USCA, and created undue prejudice and undue preference, in violation of Sections 2 and 3 of Title 49 USCA (See 152 I.C.C. 355 (358)) because at page 41 of 273 I. C. C. 33, the following appears:

> "• • • but when comparing so-called mismatched classes, for example, third class in Southern and first or second in Official, minimum charges on less-than-carload and any-quantity traffic, as well as on carload traffic, are necessary."

The use of minimum rates, as the reports of the Commission conclusively show (152 I.C.C. 355 (358)) is to avoid the fourth-section departures and to prevent the undue preference and prejudice that were created by the more favorable terms and conditions of transportation given to Danville and withheld from Lynchburg. The carriers created the fourth-section departures and created the undue preference and prejudice when they gave Danville more

favorable terms and conditions on which to purchase transportation service and withheld those terms and conditions from Lynchburg. As an example, when the carriers established a third class rating on shoes moving between points in Official territory and Danville, Virginia and established a first class rating on the same shoes moving between Lynchburg, Virginia and points in Official territory, resulting in a rate of 84 cents from New York to Danville (Danville is a point 64 miles south of Lynchburg) and a rate of 111 cents from New York to Lynchburg (Lynchburg is an intermediate point to Danville), they gave Danville an advantage over Lynchburg. Therefore, the establishment of the more favorable Classification rating of third class on shoes moving to Danville and withholding from Lynchburg the same third class rating on shoes moving to Lynchburg is the reason for "minimum rates" because class-for-class the rates are lower to Lynchburg than to Danville to and from points in Official territory, so with mismatched ratings to Danville and Lynchburg, departures from the provisions of the Act (49 USCA) are created, for which departures the minimum rates here authorized are used to continue in effect the more favorable treatment given Danville. As an example of the fact that Lynchburg is entitled to lower rates, class-for-class, than Danville, the rates between New York and Danville are: first class 120 cents; second class 102 cents; and third class 84 cents; and between New York and Lynchburg, the rates are: first class 111 cents; second class 94 cents; and third class 78 cents. Therefore, minimum rates are unnecessary when Lynchburg is permitted to purchase transportation service upon the same terms and conditions as the terms and conditions on which Danville purchases transportation service.

The decision appealed from permits Danville to purchase transportation service on shoes moving from New York at

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a third class rating, resulting in a rate of 84 cents, and it withholds from Lynchburg the third class rating, which rating would permit Lynchburg to purchase that service at a rate of 78 cents. Consequently, a third class rating to Lynchburg would permit Lynchburg to purchase transportation service on shoes moving from New York on the same terms and conditions as those on which Danville purchases the same transportation service; or a first class rating to Danville, resulting in a rate of 120 cents and a first class rating to Lynchburg resulting in a rate of 111 cents, would permit Danville to purchase transportation service on shoes moving from New York on the same terms and conditions as those on which Lynchburg purchases the same transportation service. There is a difference of 6 cents in favor of Lynchburg over Danville in the third class rate from New York to Danville of 84 cents and from New York to Lynchburg of 78 cents; and there is a difference of 9 cents in favor of Lynchburg over Danville in the first class rate from New York to Danville of 120 cents and from New York to Lynchburg of 111 cents. Consequently, if Lynchburg and Danville are permitted to purchase transportation service on the same terms and conditions, then there never will be any need for minimum rates. It is clear, therefore, that the use of minimum rates denies Lynchburg her natural advantage of 6 cents in the third class rate and 9 cents in the first class rate. But, rather than to permit Lynchburg to purchase transportation service on the same terms and conditions as those on which Danville purchases transportation service, the orders and report of the Commission and the decision appealed from authorize the carriers to apply at Danville the rate to Lynchburg as the minimum rate at Danville, which destroys the natural rate competitive relationship between Lynchburg and Danville. Consequently, since Lynchburg cannot purchase transportation service, mile-for-mile or class-for-class or rating-for-rating, on the same

terms and conditions as those on which Danville purchases the same transportation service, the decision appealed from may be contrary to the principle announced in the decision of the Supreme Court in *Howitt* v. *U. S.*, 328 U. S. 189, where at page 193, the following appears:

> "The Interstate Commerce Act imposes the same duty on ticket sellers and clerks of common carriers as that imposed on railroad officers and other employees to treat all the public alike as to terms and conditions of transportation."

Consequently, holding at Danville the rate to Lynchburg of 111 cents as the minimum rate at Danville, when Lynchburg is entitled, class-for-class, to a lower rate due to distance than Danville is entitled to, is denying Lynchburg transportation upon the same terms and conditions as the terms and conditions upon which Danville purchases the same transportation. Therefore, applying the rate to Lynchburg as the minimum rate at Danville is contrary to the authority vested in the Commission by the provisions of the Interstate Commerce Act, as more favorable terms and conditions of transportation are given Danville than the terms and conditions given Lynchburg.

This proceeding, as we have tried to briefly point out in the paragraphs that precede this paragraph, is a proceeding that the Supreme Court of the United States ought, by all means, to review, notwithstanding what the appellees may contend, as in this proceeding is involved the question of whether or not the Interstate Commerce Commission can use its rate-making power in prescribing minimum rates or otherwise, so as to build up one community or territory and to destroy another community or territory by giving one community transportation service on more favorable terms and conditions than the terms and conditions on which the other community is required to purchase the same

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transportation service; whether or not the Commission can use its power to fix minimum rates so as to have the direct affect of repealing or superseding the provisions of Sections 1, 2, 3, and 4 of the Act, Title 49 U. S. C. A.; whether or not the Commission can authorize the carriers to disregard the provisions of Sections 1, 2, 3, and 4 of the Act (49 U. S. C. A.) by establishing and maintaining minimum rates; and whether or not the Commission can give the carriers authority to avoid fourth-section departures and to disregard undue prejudice and preference created by giving one community transportation service on more favorable terms and conditions than the terms and conditions on which the other community must purchase transportation service. The comments herein made show that the questions involved in this proceeding *are substantial.*

W. G. Burnette,
Counsel for Appellant.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Civil Action No. 203

LYNCHBURG TRAFFIC BUREAU, *Plaintiff*,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., *Defendants*

(Argued May 5, 1949. Decided —— —, ——)

Before Dobie, Circuit Judge and Paul and Barksdale, District Judges

W. G. Burnette, Attorney for Plaintiff.

Edward Dumbauld, Herbert A. Bergson and Howard C. Gilmer, Jr., Attorneys for the United States.

J. Stanley Payne, Daniel W. Knowlton, Attorneys for Interstate Commerce Commission.

D. Lynch Younger, Attorney for Railroads.

DOBIE, *Circuit Judge:*

The present civil action was brought by the plaintiff, Lynchburg Traffic Bureau, a Virginia corporation representing business firms in the City of Lynchburg in transportation matters, to have set aside and annulled certain orders and reports of the Interstate Commerce Commission (hereinafter referred to as the Commission). A special court was constituted, as required by 28 U. S. C. A. §§ 2284, 2325, to hear and determine the action.

A brief review of the history and background of the orders here involved is necessary for an understanding of their significance.

The geographical area east of the Mississippi River is divided into two major rate territories. What is known as official Classification (or Official) Territory embraces

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that territory east of the Mississippi and north of a line which follows the Ohio River from its mouth to Cincinnati and then follows the lines of certain railroads through West Virginia and Virginia to Norfolk, Virginia. Southern Classification (or Southern) Territory embraces the area east of the Mississippi and south of Official Territory.

The class rate structures applicable within each of these two territories were prescribed by the Commission, following extensive investigations, in Eastern Class Rate Investigation, 164 I. C. C. 314 (1931), and Southern Class Rate Investigation, 100 I. C. C. 513 (1928). With respect to traffic moving intraterritorially, the class rate of the particular territory through which the traffic moves, governs. But since the rates and the classifications of various commodities applicable within the two territories are different, there is presented the problem of effecting a fair and equitable adjustment of rates on traffic moving interterritorially. The orders of the Commission presently under attack were designated to effect, on such traffic, a more equitable adjustment than has hitherto existed.

Prior to the orders in question, the rates on interterritorial traffic were determined, generally, as follows: Certain so-called "hold-points" (i.e., points in Official Territory through which interterritorial traffic would pass) were designated on the border between Official Territory and Southern Territory. Cities, then, in Southern Territory were grouped around each of these hold-points. For example, for traffic moving from a particular section in Official Territory to Danville, Virginia, Lynchburg, Virginia, is the hold-point; and Danville, for such traffic, is said to be in the "Lynchburg Group." Basically, the rates on interterritorial traffic were those prescribed for the Southern Territory, but it was provided that, where these rates were below the level of the Official Territory rates applicable between the extreme point in Official Territory and the hold-point, the latter rate would govern. In other words, the Southern Territory rates governed interterritorial shipments with a qualification that the Official Territory rate to the hold-point should provide a minimum.

Prior to 1940, this basic adjustment was applicable to both carload and less-than-carload traffic. During the nineteen-thirties, however, the southern rail carriers had suffered from rising competition from the motor carriers. In order to meet this competition, all ratings on less-than-carload traffic above third-class were reduced to that level, and the minimum rate provision on interterritorial traffic was made inapplicable to less-than-carload freight.

Since these reduced ratings were applicable only within Southern Territory and interterritorially, the result was that on less-than-carload interterritorial traffic the through rates between many points in Southern Territory and points in Official Territory were, in numerous instances, less than the rates between the intermediate points in Official Territory. This, of course, resulted in departures from 49 U. S. C. A. § 4(1), which Fourth Section Departures were authorized by the Commission in Fourth Section Order 14001.

The obvious inequities of this adjustment led to negotiations and investigations following which the Commission approved the orders here under discussion. These orders are contained in a report by the Commission. Minimum Rates on Rail Traffic Between the North and the South, 273 I. C. C. 33 (Nov. 10, 1948). Very briefly, the orders provide a new organization of hold-points and groupings designed to bring the hold-points into closer harmony with the service routes over which traffic actually moves between north and south. And (the chief point of contention) the new orders make applicable as a minimum on interterritorial traffic (both carload and less-than-carload) the rate between Official Territory origin or destination and the appropriate hold-point at the border. Inasmuch as the Southern ratings (reduced to meet motor carrier competition) are still lower with respect to many articles than the ratings in effect in Official Territory, the minimum rate provision determines the charges on many interterritorial shipments into and out of cities in Southern Territory close to the border. This, of course, results in blanketing the rates applicable throughout these defined "Groups" in Southern Territory at the level of the rate to the particular border point chosen as a hold-point for that group.

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An example may best serve to highlight plaintiff's objection to these orders. Danville, Virginia, is located within Southern Territory approximately 65 miles south of Lynchburg, Virginia, in Official Territory. The first-class rate on traffic between New York and Lynchburg is 111 cents; between New York and Danville, 120 cents. Shoes, clothing, dry goods, etc., are classified first-class in Official Territory, but, due to the exceptions to the Southern Classification effected in 1940, these items are all classified third-class in Southern Territory. The third-class rate from New York to Danville is 84 cents. Since New York and Lynchburg are both in Official Territory, the first-class ratings and the resulting rate of 111 cents are applicable to shipments of these commodities between those cities. Since, however, the Southern ratings govern interterritorial shipments, the rate on shipments of these commodities between New York and Danville would be the third-class rate of 84 cents, were it not for the minimum provision of the present orders. That provision raises the rate to and from Danville to the rate of 111 cents applicable to and from Lynchburg.

Although this adjustment is obviously more equitable than that which preceded these orders, plaintiff complains that due to the application of the same rate to both Lynchburg and Danville, Danville is receiving 65 miles of "free transportation services."

The plaintiff's position, essentially, presents a frontal attack on the practice of establishing a uniform blanket, or group, rate applicable to many points within a given area. This is true since, due to the minimum rate provision of the new orders, there are no instances in which a *lesser* charge is made for carriage over a greater distance. We are therefore not concerned with violation of the "long-haul, short-haul" clause of the Interstate Commerce Act, 49 U. S. C. A. § 4 (1). Plaintiff's complaint is that an *equal* charge is made for carriage over a greater distance.

The Commission has repeatedly approved the application of blanket rates over wide areas. Extreme examples are the rates on lumber and on citrus fruit, with respect to which blankets have been established throughout the area east of the Mississippi and, in some instances, throughout

even larger areas. In its decision in Commodity Rates on Lumber and Other Forest Products, 165 I. C. C. 561, 565, the Commission said:

> "It is hardly necessary to say that the practice of grouping points of origin or destination and applying the same rate to all points within the group is an outstanding characteristic of the rate structure of the country. This practice has existed from the very beginning and in principle meets with general approval. Such groupings may be actuated in large part by commercial and competitive reasons, as in the case of the great citrus fruit and lumber blankets, or it may be resorted to merely for convenience and simplicity of rate publication. In a multitude of cases we have recognized its necessity and desirability."

The legality of the use by the Commission of such blanket rates was upheld by the Supreme Court in Illinois Commerce Commission v. United States, 292 U. S. 474, 486 (rehearing denied 293 U. S. 628), where the Court held:

> "Treating an area as a unit and applying a uniform blanket or group rate within it, as is the common practice with respect to switching rates, is within the competence of the Commission."

See, also, St. Louis S. W. Ry. Co. v. United States, 245 U. S. 136.

The plaintiff contends that the use of minimum rates is unlawful per se. This proposition, as thus broadly stated, clearly cannot be sustained, running—as it does—directly counter to the express grant to the Commission, in Section 15 (1) of the Act, 49 U. S. C. A. § 15 (1), of power to "determine and prescribe * * * the maximum or minimum, or maximum and minimum, to be charged" whenever the Commission finds the rate then in effect to be unreasonable, unjustly discriminatory, unduly preferential or prejudicial, or otherwise in violation of any provision of the Act. Under this section the Commission can fix the ceiling above which the carrier may not go, and the floor below

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which it may not go, or it may prescribe the precise rate to be charged.

The Commission has repeatedly exercised the minimum rate power, and its authority in this respect has been fully sustained by the courts. New York v. United States, 331 U. S. 284, 343-349; Youngstown Sheet & Tube Co. v. United States, 295 U. S. 476; Jefferson Island Salt Mining Co. v. United States, 6 F. (2d) 315.

The plaintiff argues that the use of minimum rates is here made necessary by the preferential rates resulting from the approval by the Commission of different classifications (ratings) within Official and Southern Territories. Its argument proceeds that these mismatched ratings are, themselves, unlawful; hence the Commission has no power merely to *prevent* (by the use of minimum rates) any evils which flow from such mismatched ratings but must *remove* the mismatching by equalizing the ratings themselves. This argument, even if otherwise valid, must certainly fall if its major premise (i. e., that the use of different ratings in different territories is unlawful) is false. We think this premise is clearly erroneous.

It would undoubtedly be desirable from many standpoints and, at least apparently, the most equitable practice to require all carriers to adhere to a single mileage scale with the rates increased proportionately to an increase in distance. The Commission has recognized this general proposition in Consolidated Freight Classification, Docket 28310 (1939), and ordered uniformity in classification ratings throughout the country. Even in that proceeding, however, it was fully understood that carriers must still be free to publish exceptions to the classification for application within particular rate territories or on particular lines of railroads. This power to establish classification exceptions is necessary so that rate structures may be adjusted to reflect the needs of commerce in particular areas rather than purely nation-wide considerations. See New York v. United States, *supra* at 300, 305, 350. The very facts which led to the exceptions here involved (the severe competition in the south between the rail and motor

carriers) serve to emphasize the need for flexibility in the system.

There clearly is no express prohibition against the use of minimum rates anywhere in the Act. We can declare their use, here, unlawful only if the resulting rates are in some fashion violative of the Act. The plaintiff asserts that the resulting rates violate Sections 1 through 4 of the Act, 49 U. S. C. A. §§ 1-4, and the National Transportation Policy declared by Congress. 54 Stat. 899, 49 U. S. C. A. notes preceding §§ 1, 301, 901, 1001.

Section 1(5) of the Act requires rates to be just and reasonable; Sections 2 and 3(1) denounce relations of rates which result in unjust discrimination or undue prejudice, or preference, against, or in favor of, persons or places.

While at first glance it must appear unreasonable, discriminatory, etc., to charge the identical rate to both Lynchburg and Danville, despite the 65 miles additional haul to the latter, in stressing the comparison of rates between these two near-border cities the plaintiff overlooks the fact that the problem facing the Commission was that of effecting an adjustment on traffic passing between two major rate territories, each involving many states. In any solution to this problem, mathematical niceties are impossible and border-line discrepancies are perhaps inevitable. Even were we to consider de novo the reasonableness of the rates established in the Commission's orders, we should certainly do so in the light of this highly complex problem and not in the light, merely, of the resulting rates between two border cities.

Our function, however, is much more limited. Whether or not rates prescribed by the Commission are unreasonable, unjustly discriminatory or unduly prejudicial, in violation of Sections 1, 2, and 3 of the Act, have repeatedly been held to be questions, not of law for determination by the courts, but of fact within the cognizance of the Commission. Board of Trade of Kansas City v. United States, 314 U. S. 534, 546, 548; Rochester Telephone Corp. v. United States, 307 U. S. 125, 139-140; Pennsylvania Co. v. United States, 236 U. S. 351, 361; Illinois Cent. R. R. v. I. C. C., 206 U. S. 441, 455. Although the Commission's determination is of course subject to judicial review, that review does not con-

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sist of trial de novo of these facts, Tagg Bros. v. United States, 280 U. S. 420, 443; Keller v. Potomac Elec. Co., 261 U. S. 428, 442; but (so far as is here material) consists merely of an inquiry to determine whether or not the Commission's findings are supported by substantial evidence. Assigned Car Cases, 274 U. S. 564, 580-581; Virginian Ry. Co. v. United States, 272 U. S. 658, 663; Western Chemical Co. v. United States, 271 U. S. 268, 271; United States v. L. & N. R. R., 235 U. S. 314, 320. A reading of the Commission's report in the case before us, 273 I. C. C. 33, indicates substantial evidence to support the Commission's findings, and we can find no violations of Sections 1, 2 or 3 of the Act.

The language of Section 4 of the Act upon which plaintiff apparently relies is: "It shall be unlawful for any common carrier * * * to charge or receive any greater compensation * * * for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance * * *." 49 U. S. C. A. § 4(1). And yet, as we have already pointed out, the new orders result in not a single instance where a *greater* charge is made for a shorter than for a longer distance.

The Commission has uniformly held that Section 4 does not prohibit charging to a more distant point the *same* rate as that to an intermediate point. Birmingham Traffic Bureau v. St. Louis-S. F. Ry. Co., 118 I. C. C. 756; Idaho Commercial Clubs, v. Oregon Short Line R. R. Co., 18 I. C. C. 562; Milk Producers' Protection Assn. v. Delaware, L. & W. R. Co., 7 I. C. C. 92. Our attention has been called to no case in which either the Commission or the courts have held that such a rate contravenes Section 4.

It is true that Section 4(1) provides (following the long-haul, short-haul clause just quoted): "* * * but this shall not be construed as authorizing any common carrier * * * to charge or receive as great compensation for a shorter as for a longer distance * * *." Senator Cullom, on January 10, 1887, in explaining this provision to the Senate, stated:

> "The declaration * * * does not in terms prohibit the charging as much for a shorter as for a longer

distance, but simply withholds the legislative sanction from the making of such a charge. This qualifying clause negatives the inference that might possibly be drawn from the language of the section without these words, namely: that an equal charge for a shorter distance is authorized by inference because only a greater charge is prohibited. This qualification, therefore, leaves the question of whether an equal amount can be charged for the shorter distance to be determined by the provisions of the bill to which I have already referred, requiring all charges to be reasonable, and forbidding the giving of an unreasonable preference or advantage to any particular locality." 18 Cong. Rec. 485.

It is thus clear that the charging of the same rate to both Lynchburg and Danville is not violative of Section 4 of the Act, and that section leaves it to the Commission to determine whether such a rate is unreasonable or otherwise violative of other portions of the Act.

There is no merit in plaintiff's contention that the Commission's orders are contrary to the National Transportation Policy declared by Congress. Nothing in that broad, general declaration of policy prohibits the establishment of minimum rates found by the Commission, upon an ample record, to met the several substantive tests of the Act.

The plaintiff suggests an alternative method of integrating the rate structures of these two contiguous territories, which method, plaintiff urges, is far more equitable than that approved by the Commission. But we have indicated that we find substantial evidence supporting the findings upon which the Commission's orders are based, and that those orders are in no wise violative of the Act; and there our inquiry must stop. The selection of one of several alternative solutions to such a problem as this, none of these solutions involving any violations of the Act, is solely within the competence of the Commission. See Ayrshire Collieries Corp. v. United States, 335 U. S. 573, 593. We therefore decline the opportunity to point out why we think the Commission's solution, contained in the present orders, is in fact far more desirable than that suggested by plaintiff.

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The plaintiff's petition to set aside and annul the Commission's orders is denied and the plaintiff's action is dismissed.

Dismissed.

I concur.

(Signed) A. M. Dobie,
U. S. Circuit Judge.

I concur in the foregoing opinion June 14, 1949.

(Signed) John Paul,
District Judge.

I concur.

(Signed) A. D. Barksdale,
U. S. Dist. Judge.

[seal]

June 17, 1949.

A Copy. Teste:
(S.) Louis H. Price,
Deputy Clerk.

Endorsed: Filed June 30th, 1949.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

Held at Lynchburg on the 30th day of June, 1949

Before Honorable A. M. Dobie, United States Circuit Judge; Honorable John Paul, United States District Judge; Honorable A. D. Barksdale, United States District Judge

No. 203 Civil

Lynchburg Traffic Bureau, *Plaintiff*

versus

United States of America, Interstate Commerce Commission, et al., *Defendants*

This action having been considered upon the complaint and upon the answers of the named defendants and the answers of intervening defendants and upon the exhibits

submitted with said complaint and answers and upon the arguments of counsel of all parties in interest.

And it being the opinion of the court, for reasons which have been stated in the original opinion filed herein, that the prayer of said complaint to set aside and annul certain orders and a report of the Interstate Commerce Commission dated the 10th day of November, 1948 and the 3rd day of January, 1949, is without merit.

Now, therefore, it is Ordered that the said prayer of said complaint be denied and that this action be, and the same is hereby, dismissed at the cost of the plaintiff.

To which action of the court in dismissing said complaint the plaintiff by counsel, objected and excepted for reasons fully stated to the court.

And the clerk of this court shall certify and mail copies of this order together with a copy of the court's opinion to counsel of record in this action.

Enter.

(Signed) ARMISTEAD M. DOBIE,
United States Circuit Court.
(Signed) JOHN PAUL,
United States District Judge.
(Signed) A. D. BARKSDALE,
[SEAL.] *United States District Judge.*

A Copy. Teste:
(S.) LOUIS H. PRICE,
Chief Deputy Clerk.

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FILED
OCT 4 1949
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

October Term, 1949

Case No. 363

LYNCHBURG TRAFFIC BUREAU,
Plaintiff-Appellant.

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

Brief of Appellant in Opposition to the Motion to Affirm, Filed by Appellees—The Interstate Commerce Commission and the Department of Justice.

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IN THE

Supreme Court of the United States

October Term, 1949

Case No. .....

LYNCHBURG TRAFFIC BUREAU,

PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*,

DEFENDANTS-APPELLEES

Brief of Appellant in Opposition to the Motion to Affirm, Filed by Appellees—The Interstate Commerce Commission and the Department of Justice.

This is a direct appeal from the final decision in Civil Action 203, (District Court for Western District of Virginia, Lynchburg Division), dated June 30, 1949, of a specially constituted District Court of three judges, established pursuant to Title 28, United States Code, "Judiciary and Judicial Procedure," dismissing appellant's petition for an order enjoining, setting aside and forever annulling the report and orders of the Interstate Commerce Commission dated November 10, 1948 and January 3, 1949, reported at 273 I. C. C. 33 and 84 F. Supp. 1012.

THIS PROCEEDING

This proceeding is not complicated, as it, in simple terms, involves the question of whether or not the Interstate Commerce Commission can use its rate-fixing powers so as to pull out, from 10,143 Classification ratings, 3,500 Classification items and then give those items special and preferential treatment when such items move between points in Southern territory and points in Official territory and deny like or similar treatment of those 3,500 Classification items when such items move between points in Official territory.

The special and preferential treatment of those items for Danville has resulted in the establishment of lower-rates, mile-for-mile, at Danville than the rates formerly applicable at Danville and lower rates, mile-for-mile, to Danville than to Lynchburg. In order for Danville to enjoy the advantage of the special and preferential ratings given on the 3,500 Classification items, the Commission has authorized the carriers to give Danville free transportation service for a 64-mile haul beyond Lynchburg to Danville, as the rate to Lynchburg is authorized to be applied as the minimum rate at Danville. A charge, in the past, has been made of 9 cents in the first class rate, 8 cents in the second class rate, and 6 cents in the third class rate for the additional transportation service rendered in transporting this traffic 64 miles beyond Lynchburg to Danville. We are here seeking to have this Honorable Court to have restored, on each of the 3,500 Classification items, the former advantage Lynchburg had over Danville of 9 cents in the first class rate, 8 cents in the second class rate, and 6 cents in the third class rate.

There are 10,134 Classification ratings and, out of those ratings, 9,343 ratings were alike prior to September 1, 1940, on traffic moving between points in Southern territory and points in Official territory and between points in Official territory (262 I. C. C. 447 [469]). But, on September 1, 1940, the carriers, with the approval of the Commission, reduced 3,500 Classification ratings on traffic moving between points in Southern territory and points in Official territory and refused to establish like ratings on the 3,500 Classification items on traffic moving between points in Official territory. Consequently, we find the defendants-appellees contending that the rate to Lynchburg (on the group theory) should be the

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minimum rate at Danville, as to the 3,500 Classification items. But, on the remaining 5,843 Classification ratings, Lynchburg will continue to have her natural advantage over Danville of 9 cents, 8 cents, and 6 cents, in the first, second, and third class rates, respectively. The contention of the defendants-appellees about the group theory is arbitrary and its use here is a gross abuse of the rate-fixing powers of the Commission because how can the carriers lawfully apply the Lynchburg rate at Danville on 3,500 Classification ratings and then apply at Danville on the remaining 5,843 Classification ratings, the rate to Danville, which rate is higher than the rate to Lynchburg by 9 cents in the first class rate, 8 cents in the second class rate and 6 cents in the third class rate, without violating the provisions of the Act? Obviously, we are entitled to the relief we seek.

THE REASON FOR THIS SUIT

Prior to September 1, 1940, the Classification ratings on some 3,500 Classification items were the same on each item moving between points in Official territory, including New York, N. Y. and Lynchburg, Virginia, as the Classification ratings were on each item moving between points in Southern territory, including Danville and points in Official territory, including New York, N. Y., and on September 1, 1940, as representative, the first class rate was 120 cents, the second class rate was 102 cents, and the third class rate was 84 cents between New York, N. Y., and Danville, Virginia, and the first class rate was 111 cents, the second class rate was 94 cents, and the third class rate was 78 cents between New York, N. Y. and Lynchburg, Virginia. Prior to September 1, 1940, the Classification rating was first class on shoes, clothing, and dry goods, moving to and from Danville and New York and first class on the same articles moving to and from Lynchburg and New York. Consequently, prior to September 1, 1940, the rate on clothing, shoes, and dry goods was 120 cents between New York, N. Y. and Danville, Virginia, and 111 cents between New York, N. Y. and Lynchburg, Virginia. However, on September 1, 1940, the carriers reduced the Classification ratings on 3,500 Classification items moving between points in Southern territory, including Danville, and points in Official territory, including New York, N. Y., resulting in a reduction

in the rating on clothing, shoes, and dry goods from first class to third class between New York and Danville, but made no reduction in the ratings on the same 3,500 Classification items when moving within Official territory, including New York, N. Y., and Lynchburg, Va., consequently, the first class rating continued in effect on shoes, clothing, and dry goods moving between New York and Lynchburg. Therefore, effective September 1, 1940, the rate on shoes, clothing, and dry goods, was reduced between New York and Danville from 120 cents to 84 cents and the rate continued to be 111 cents between New York, N. Y. and Lynchburg, Virginia. Since the rate of 84 cents to Danville is less than the rate of 111 cents to Lynchburg, the rate of 111 cents to Lynchburg was authorized by the Commission to be held as the minimum rate at Danville. Therefore, on September 1, 1940, the advantage of Lynchburg, Virginia over Danville, Virginia, of 9 cents in the first class rate and 9 cents in the rates on clothing, shoes and dry goods moving from New York, N. Y., was destroyed and Danville was given the rate applicable to Lynchburg as the minimum rate at Danville, not withstanding the fact that Danville is 64 miles greater distance than is Lynchburg to and from points in Official territory located north of Lynchburg and that, class-for-class, Lynchburg is entitled to lower rates, due to distance, than Danville, Virginia.

The Interstate Commerce Act (49 USCA) provides that it is unlawful for a rail carrier to demand or collect from one person a greater or less compensation than it demands or collects from another person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic (49 USCA 2); to make, give, or cause any undue or unreasonable preference or advantage to any particular person, locality, territory, or gateway or any particular description of traffic, in any respect whatsoever, or to subject any particular person, locality, territory, or gateway or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (49 USCA 3); and to charge more for a shorter haul than for a longer haul over the same route (49 USCA 4).

Therefore, since the rail carriers did establish, on September 1, 1940 (special rates) more favorable Classification ratings on traffic moving between Southern territory, including Dan-

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ville, Virginia, and points in Official territory, including New York, N. Y., than the Classification ratings they maintained on the same articles moving between points in Official territory, including movement between New York, N. Y., and Lynchburg, Virginia, and since they did give undue and unreasonable preference or advantage to points in Southern territory, including Danville, over points in Official territory, including Lynchburg, Virginia, which preference and special rates caused lower charges to be established for longer hauls than for shorter hauls, and since such rates and ratings are declared to be unlawful by the provisions of Sections 1, 2, 3, and 4 of the Act (49 USCA 1, 2, 3, 4) and since such unlawfulness is admitted by the Commission in its effort to mitigate the unlawfulness by the observance of the rate to Lynchburg as the minimum rate at Danville, we raise the question, among others, of whether or not, under the law, the Interstate Commerce Commission can use its rate-fixing powers, as it has done here, so as to build up one community (Danville) and destroy another community (Lynchburg), and whether or not legal relief can be had by the community suffering from the special or preferential Classification ratings given the preferred community.

The rate-fixing power of the Commission is being used to give shippers between points in Southern territory, including Danville, Virginia, and points in Official territory, including New York, N. Y., *transportation service on* 3,500 *Classification items on more favorable terms and conditions than the terms and conditions* the Commission has provided on the same 3,500 Classification items for shippers within Official territory, including Lynchburg, Virginia and New York, N. Y. By these statements, we mean that the Commission has approved Classification ratings, as an example, on traffic moving between Danville and points in Official territory which have the effect of giving Danville *free transportation service beyond Lynchburg to Danville*, because instead of charging Danville 9 cents, 8 cents, and 6 cents in the first, second and third classes, respectively, more from and to New York, than they charge at Lynchburg from and to New York on the same traffic, the Commission has authorized the carriers to make *no charge* for the transportation service rendered in transporting this same traffic 64 miles beyond Lynchburg to Danville.

The Commission has recognized that Danville and Lynchburg as entitled to different rates on each class, as the Commission in *North Carolina Corporation Commission* v. *A. C. & Y. R. R.*, 213 I. C. C. 259; in *Eastern Class Rate Investigation*, 164 I. C. C. 314; and in *Class Rate Investigation*, 1939, 262 I. C. C. 447, prescribed a mileage scale of rates to Danville, Virginia and to Lynchburg, Virginia, for application to and from points in Official territory, including New York, N. Y. In the Carolina Case, for rate-making distance (meaning the short-line distance) of 465 miles between New York and Danville, the Commission prescribed a first class rate of 120 cents, including increases under Ex Parte 123, and prescribed a first class rate of 137 cents in the *Class Rate Investigation Case*, 262 I. C. C. 447, and for the rate-making distance (meaning the short-line distance) of 401 miles between New York, N. Y. and Lynchburg, Virginia, the Commission prescribed between New York, N. Y. and Lynchburg, Virginia, a first class rate of 111 cents in the *Eastern Class Rate Case*, 164 I. C. C. 314, including increases under Ex Parte 123, and prescribed a first class rate of 128 cents in the *Class Rate Investigation Case*, 262 I. C. C. 447. Consequently, it is obvious from those decisions of the Commission that class-for-class, Lynchburg, Virginia is lawfully entitled to lower charges on every shipment than the charge applicable at Danville on the same shipment. The aforesaid decisions rebut any assumption that Lynchburg and Danville should be grouped and that the rate to Lynchburg should be the minimum rate at Danville. The aforesaid decisions raise the presumption that the rate to Lynchburg will be the minimum rate at Danville *only by giving Danville more favorable Classification ratings than those given Lynchburg* and that is exactly what has happened here, as the carriers have given Danville 3,500 reduced Classification ratings and withheld those ratings from Lynchburg, resulting in a first class rating at Lynchburg and a third class rating at Danville on such articles as shoes, clothing, and dry goods.

The report of the Commission shows, at sheet 41 of 273 I. C. C. 33, the following:

> "A comparison of rates under the proposed adjustment between representative points in Central and Southern territories shows that, class for class, no difficulties are

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> experienced with the proposed hold points but when comparing so-called mismatched classes, for example, third class in Southern and first or second in Official, minimum charges on less-than-carload and any-quantity traffic, as well as on carload traffic, are necessary."

Consequently, it is clear from the decision of the Commission that the 3,500 reduced Classification ratings created the necessity for minimum rates.

This suit is necessary to determine whether or not the Commission can lawfully approve more favorable Classification ratings (mismatched classes) on traffic moving between points in Official territory and points in Southern territory than the Classification ratings maintained on the same traffic moving between points in Official territory, when, as here, the more favorable rating (mismatched classes) has resulted in the complete destruction of the natural rate competitive relationship of Lynchburg over Danville and has placed Danville in a more favorable (unnatural) position to grow at the expense of Lynchburg simply because giving Danville 3,500 reduced Classification ratings and withholding the same ratings from Lynchburg has unduly preferred Danville, and will continue to prefer Danville, at the expense of Lynchburg. We think the Commission cannot use its permissive powers under Section 15(1) of the Act to sanction preference and close its eyes with respect to the mandatory provisions of Sections 1, 2, 3 and 4 of the Act, which apparently has happened when the Commission permitted the carriers to create unjust discrimination, undue preference and prejudice and fourth-section departures by the establishment of 3,500 reduced Classification ratings for Danville and withholding the same ratings from Lynchburg.

In *Portland R. L. & P. E. v. Railroad Commission* (229 U. S. 397), 33 S. Ct. 820, at page 826, the following appears:

> "If the state may not thus legislate as to its domestic corporations, they, by merely arbitrary action, may so exercise their rate-fixing power as to build up one community and destroy another, and prevent that equality of treatment which it has been the object of many statutes of this kind, passed under state and Federal authority, to secure."

The action of the Commission in permitting more favorable Classification ratings for one territory or city and the denial of like ratings to another territory or city, destroys that equality of treatment guaranteed by the Interstate Commerce Act (49 USCA) and the action of the District Court in affirming the report and orders of the Commission is contrary to law.

REPEAL OF THE INTERSTATE COMMERCE ACT

The appeal should be granted and, after full hearing by this Honorable Court, the order of the District Court should be reversed, because the Court would permit the Commission to use its rate-fixing powers so as to give special rates to particular shippers of 3,500 Classification items in that more favorable Classification ratings are given shippers of those articles when those articles move between points in Southern territory, including Danville, Virginia, and points in Official territory, including New York, N. Y., than the Classification ratings the Commission gives shippers of the same articles when the articles move between points within Official territory, including Lynchburg, Virginia and New York, N. Y. (see 49 USCA 2).

The appeal should be granted and, after full hearing by this Honorable Court, the order of the District Court should be reversed because the District Court would permit the Commission, contrary to the mandatory provisions of the Act (49 USCA) to use its permissive rate-fixing power under Section 15(1) of the Act, so as to create and continue undue preference for shippers in Southern territory, including Danville, Virginia and create and continue undue prejudice of shippers in Official territory, including Lynchburg, Virginia and New York, N. Y., and to permit the carriers to establish ratings that create departures from the long-and-short-haul clause of Section 4 simply by permitting the carriers to establish more favorable Classification ratings on 3,500 Classification items when those items move between points in Southern territory, including Danville, Virginia, and points in Official territory, including New York, N. Y., than the Classification ratings the carriers provide on the same 3,500 Classification items when those items move between points within Official territory, including Lynchburg, Virginia and New York, N. Y. (see Sections 3 and 4, 49 USCA 3 and 4).

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Not withstanding the contention that the adjustment the Commission approved in this proceeding and the alleged grounds offered in support of the orders of the Commission, which the District Court affirmed, the true fact remains that prior to September 1, 1940, the Classification ratings on these 3,500 Classification items were the same on traffic moving between points in Southern territory, including Danville, Virginia, and points in Official territory, including New York, N. Y., as were the Classification ratings on the same 3,500 Classification items when moving between points in Official territory, including Lynchburg, Virginia and New York, N. Y. In other words, prior to September 1, 1940, the rate on shoes, clothing, etc., was 120 cents per one hundred pounds at Danville, Virginia and 111 cents per one hundred pounds at Lynchburg, Virginia, on shipments moving to and from New York, N. Y. But, on September 1, 1940, the rate of 120 cents at Danville was reduced to 84 cents and the rate at Lynchburg of 111 cents continued in effect to and from New York, N. Y. The Commission has used its rate-fixing powers in a way so as to take away from Lynchburg, Virginia, her natural advantage over Danville, Virginia, of 9 cents per one hundred pounds on shipments of shoes and on approximately 3,500 other items moving to and from New York, N. Y., including also all points in Official territory, simply by changing the Classification ratings on these 3,500 items so as to give Danville lower Classification ratings than those given Lynchburg.

If the Commission can use its rate-fixing powers so as to give special ratings to one territory or community and withhold the same ratings from another territory or community, then the provisions of Sections 2, 3, and 4 of the Act (49 USCA 2, 3, and 4) have been repealed. If special rates, undue preference, and undue prejudice and fourth-section departures can be approved rather than removed simply by holding that the special rates, undue preference and undue prejudice and fourth-section departures created by the establishment of 3,500 reduced Classification ratings to Danville can be sanctioned and the unlawful rates continued in effect under the permissive powers of the Commission contained in Section 15(1) of the Act (49 USCA 15(1)), then Sections 1, 2, 3, and 4 of the Act (49 USCA 1, 2, 3, 4) have been repealed.

FREE TRANSPORTATION SERVICE

The Interstate Commerce Commission is using its rate-fixing powers so as to create inequalities in ratings and charges on traffic moving between points in Official territory, including New York, N. Y. and Lynchburg, Virginia, on the one hand, and traffic moving between points in Official territory, including New York, N. Y., and points in Southern territory (including Danville, Virginia) on the other, and then defending its action on the grounds that it has the authority, under Section 15(1) of the Act (49 USCA 15(1)) to give Danville *free transportation* for 64 miles beyond Lynchburg, Virginia, by permitting the carriers to charge at Danville the rate to Lynchburg as the minimum rate at Danville. In other words, prior to September 1, 1940, the rate was 120 cents per one hundred pounds on shoes from New York to Danville and 111 cents per one hundred pounds on shoes from New York to Lynchburg, but the Commission has now authorized the carriers to reduce the rate on shoes from 120 cents to 111 cents from New York to Danville and the District Court has sustained the Commission. Therefore, since Lynchburg must pay transportation charges based upon the actual rate-making distance from origin to Lynchburg and since Danville had to pay transportation charges, prior to September 1, 1940, based upon the actual rate-making distance from origin to Danville, the granting to Danville and other points in Southern territory transportation service at the same charge made at Lynchburg spells out *free transportation service* or *favoritism*, as Lynchburg is required to purchase transportation service based upon the actual rate-making distance from origin to Lynchburg but Danville is authorized to purchase transportation service on those 3,500 Classification items based on the rate to Lynchburg, thus making no charge for the 64 miles additional haul beyond Lynchburg to Danville.

In *Class Rate Investigation*, 1939, 262 I. C. C. 447, at page 469, it is shown that points in Southern territory, including Danville, and points in Official territory, including Lynchburg, purchased transportation service on the same terms and conditions with respect to Classification ratings in 9,343 instances out of 10,134 ratings. In other words, equality in Classification ratings existed between Danville and points in Official

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territory, on the one hand, and Lynchburg and points in Official territory, on the other, in every instance out of 10,134 ratings except 791 ratings (262 I. C. C. 447 (469)). However, on September 1, 1940, that equality in Classification ratings was changed by the reduction in the Classification ratings on 3,500 Classification items (273 I. C. C. 33 (35)), on such items moving to and from Danville and those ratings were withheld from Lynchburg. Consequently, the equality in ratings between Danville and Lynchburg was reduced from 9,343 ratings to 5,843 ratings, or lack of equality was increased from 791 ratings to 4,291 ratings. We hope there is no man-made law that will permit any Commission or carrier to use its rate-fixing powers so as to build up communities in Southern territory and to destroy communities in Official territory by giving preference and favoritism in the form of Classification ratings to shippers in Southern territory, including Danville, Virginia, on traffic moving to and from points in Official territory, and withholding like Classification ratings on the same traffic moving within Official territory. Holding that the Commission can use its rate-fixing powers so as to give favoritism to Danville with respect to the Classification ratings on 3,500 Classification items is a holding unsupported by any law that we have been able to find. Consequently, we are here respectfully requesting this Honorable Court to hear us and to bring order out of the chaos the orders in 273 I. C. C. 33 have created.

UNJUST DISCRIMINATION

Section 2 of the Act (49 USCA 2) provides, in substance, that if the Southern Railway, Norfolk and Western Railway, or Chesapeake and Ohio Railway or the other carriers in Official territory shall directly or indirectly, by special rates (Classification ratings on 3,500 Classification items) demand or collect from shippers at Lynchburg a greater compensation (mile for mile) for any service rendered (transporting shoes) than it demands or collects from shippers at Danville for doing for him (transporting shoes) a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such a carrier is guilty of unjust discrimination.

The record shows that the circumstances and conditions prior to September 1, 1940, required that Danville pay 9 cents per 100 pounds more than Lynchburg should pay for transportation service rendered in connection with the transportation of shoes from New York. The record shows that Lynchburg is now required to pay greater compensation (mile for mile) than Danville is required to pay for like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The record, we believe, adequately shows that the Commission is using its permissive authority, under Section 15(1) of the Act so as to continue in force rates and charges that create unjust discrimination. Consequently, the order of the Commission should be set aside and appropriate relief granted.

PERMISSIVE vs. MANDATORY

The District Court, in affirming the orders of the Interstate Commerce Commission, did not give appropriate consideration to the fact that those orders were issued under the permissive provisions of Section 15(1) of the Act rather than being issued under the mandatory provisions of the Interstate Commerce Act (49 USCA). The difference between the permissive provisions of the Act and the mandatory provisions of the same Act is that the Commission is free to act under the permissive provisions of the Act only to the extent that those acts are not contrary to the mandatory provisions of the Act.

The mandatory provisions of the Act require that all charges *shall* be just and reasonable; that it *shall* be unlawful for undue preference or prejudice to exist and that it *shall* be unlawful to charge or receive a greater compensation for a shorter haul than for a longer haul (49 USCA 1(5), 3 and 4), and the permissive provisions provide that should the Commission, upon complaint or upon its own motion, find rates, ratings, or charges unlawful, that the Commission is authorized and empowered to determine and prescribe just and reasonable rates or the maximum or minimum or the maximum and minimum rate to be charged. In the exercise of the permissive authority, the Commission has approved more favorable Classification ratings for Danville than for Lynchburg on 3,500 Classification items. These favorable Classification ratings resulted in undue

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preference and prejudice, unjust discrimination and departures from the provisions of the long-and-short-haul clause of Section 4, which favorable Classification ratings are the reason for applying the rate to Lynchburg as the minimum rate at Danville.

It is our contention that Section 15(1) of the Interstate Commerce Act (49 USCA 15(1)) cannot be interpreted and used by the Commission so as to have the effect of actually repealing Sections 1, 2, 3, and 4 of the Act (49 USCA 1, 2, 3, 4), and we here call upon this Honorable Court to determine whether or not the Commission can use its permissive powers so as to repeal the Commerce Act. In other words, if the action of the Commission, as affirmed by the District Court, is correct, then the mandatory provisions of Sections 1, 2, 3, and 4 must give way to the permissive provisions of Section 15(1) of the Act. The mandatory provisions of the Act require that lawful charges shall apply at Lynchburg as well as at Danville, and since a distance of 64 miles separates Lynchburg from Danville and, since for that distance the Commission has, under the mandatory provisions of the Act, prescribed a lawful difference between Lynchburg and Danville of 9 cents in the first class, 8 cents in the second class, and 6 cents in the third class rates on all traffic moving to and from New York, N. Y., undue preference and undue prejudice will be created if the Commission, by its permissive power, takes away from Lynchburg its natural advantage over Danville. Consequently, the provisions of Section 15(1) of the Act are being used to nullify the Act and to defeat the purpose of the Commerce Act because favoritism is granted Danville in the form of more favorable Classification ratings. In *T. M. Kirkpatrick* v. *Illinois Central RR Co.*, 135 A. L. R. 607, at page 609, the following appears:

> "The outstanding purpose of the commerce act was to absolutely uproot and destroy all discriminations in interstate commerce regardless of how conceived or by what plan, scheme, or device they may be sought to be accomplished."

We believe that the purpose of the Commerce Act was to uproot and destroy all discrimination and, holding that belief, we are unable to understand why the Commission has per-

mitted the carriers to discriminate against Lynchburg by giving Danville more favorable Classification ratings on 3,500 Classification items than the ratings given Lynchburg on the same 3,500 Classification items. We respectfully submit that the permissive orders of the Commission giving the carriers the right of applying the rate to Lynchburg as the minimum rate at Danville on the 3,500 Classification items is unlawful, as that order takes away from Lynchburg her natural advantage over Danville of 9 cents, 8 cents and 6 cents, in the first, second, and third classes, respectively, and that order continues rates and charges that create unjust discrimination, undue preference and undue prejudice. Consequently, we are here requesting this Honorable Court to decide whether or not the Commission can fix Classification ratings and rates under the permissive provisions of Section 15(1) of the Act (49 USCA 15(1)) so as to have the effect of actually repealing Sections 1, 2, 3, and 4 of the Interstate Commerce Act (49 USCA 1, 2, 3, 4).

CONCLUSION

In the motion to affirm, filed by the defendants-appellees, the following appears:

> "For example, the first class rate on shoes from New York to Lynchburg is 111 cents per one hundred pounds, while the first class rate from New York to Danville is 120 cents per one hundred pounds. The result of the exceptions to the Southern Classification already described, was that the first class 120-cent rate to Danville was reduced to a third class 84-cent rate on shoes. The official territory lines did not take similar action so that the Lynchburg rate remained at 111 cents. *An obvious inequality to Lynchburg resulted. The Commission remedied this by prescribing as minima equal class rates to each locality and placed them in a rate group for this purpose.*" (S. 5) (Emphasis added).

Here, even the defendants-appellees admit that "an obvious inequality to Lynchburg resulted" from the establishment of the 3,500 reduced Classification ratings and they further show that Lynchburg is entitled to lower rates than Danville. But, they say that this obvious inequality to Lynchburg can be remedied by prescribing, as minima, equal class rates to Dan-

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ville and Lynchburg and by placing both points in the same rate group. The fixing of equal rates at Danville and Lynchburg and the grouping of those points in the same rate group is unlawful because equal rates at Danville and Lynchburg and the grouping of those points in the same rate group results in giving Danville free transportation service beyond Lynchburg contrary to the rates prescribed by the Commission in 213 I. C. C. 259, 164 I. C. C. 314, and 262 I. C. C. 447, and is a gross abuse of the permissive rate-fixing powers of the Commission. The Commission is using its permissive power under Section 15(1) of the Act (49 USCA 15(1)) so as: (1) to give Danville *free transportation service* on traffic subject to the 3,500 reduced Classification ratings as no charge is made for transporting such traffic an additional distance of 64 miles beyond Lynchburg to Danville; (2) to give Danville special and preferential Classification ratings on 3,500 Classification items; (3) to withhold from Lynchburg the same Classification ratings given Danville on the same 3,500 Classification items; (4) to repeal the mandatory provisions of Sections 1, 3, and 4 of the Act (49 USCA 1, 3, 4); and (5) to continue the unjust discrimination, undue preference and prejudice created by the establishment of the 3,500 reduced Classification ratings.

Inasmuch as Lynchburg first had a natural advantage over Danville on these 3,500 Classification items, we submit that such advantage cannot now be taken away from Lynchburg without creating undue prejudice and unjust discrimination. Nor can Danville be given equal rates with Lynchburg unless there is no difference between the cost of rendering the service to Danville and the cost of rendering the service to Lynchburg on these 3,500 Classification items (see *U. S.* v. *Illinois Cent. R. Co.*, 263 U. S. 515). Since there was a difference in the cost of the service prior to September 1, 1940 on these 3,500 Classification items and since there is a difference in the cost of the service on the other 5,843 Classification items, and since the report of the Commission does not show that the favorable Classification ratings given Danville on the 3,500 Classification items are justified by the cost of rendering the service, the orders are unlawful.

The use of the permissive power under Section 15(1) so as to give Danville an unnatural advantage over Lynchburg on 3,500 Classification ratings cannot be considered proper or

lawful, since on 5,843 Classification ratings, Lynchburg retains her natural advantage over Danville of 9 cents, 8 cents, and 6 cents in the first, second, and third classes, respectively, to and from New York. Therefore, if it is lawful for Lynchburg to have an advantage over Danville on 5,843 Classification ratings, formerly on 9,343 ratings, and to have, class for class, lower rates than Danville (213 I. C. C. 259, 262 I. C. C. 447, and 164 I. C. C. 314), then it is unlawful for Danville to have lower Classification ratings than Lynchburg and to have the same rate as the rate to Lynchburg on the 3,500 Classification ratings.

In this proceeding, we have used Danville and Lynchburg as representative of the conditions created at all points located on the border of Southern Classification territory and Official Classification territory by the establishment of the 3,500 reduced Classification ratings. This suit is directed at and includes the entire report and orders entered by the Commission in 273 I. C. C. 33.

The motion to affirm should be overruled and this Honorable Court should decree the relief sought by plaintiff-appellant, and we so pray.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU.

By: W. G. BURNETTE, *Counsel.*

1104-5 Peoples National Bank Building

Lynchburg, Virginia

October 3, 1949.

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In the District Court of the United States, Western District of Virginia, Lynchburg Division

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CIVIL ACTION NO. 203

LYNCHBURG TRAFFIC BUREAU, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CARRIERS BY RAILROAD IN OFFICIAL AND SOUTHERN CLASSIFICATION TERRITORIES, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

(Filed September —, 1949)

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree entered on June 30, 1949, by a specially constituted District Court of three judges pursuant to 28 U. S. C., Sections 2284 and 2325, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on August 27, 1949, and appeal papers served on August 31, 1949.

through which the traffic passes to destination.

In the past, the Commission has developed a system of rates for these boundary points so that these inequalities will be eliminated. In order not to disturb the complicated basic rate structures previously prescribed for the territories as a whole boundary-point adjustments have been accomplished by grouping the cities lying along the borders so that all cities in a group, both southern and northern, will enjoy the same class rates. The class rate so prescribed is the rate ordinarily applicable to one of the locations in the group. Such a control location is referred to as a hold point.[3]

[3] In *Southern Class Rate Investigation*, 128 I. C. C. 567, 601, the Commission prescribed, *inter alia*, that on traffic moving between Official Territory points and the gateway points in Virginia, the Official Territory rates would be the minima, although the Virginia gateways might be located in Southern Territory. Since then, and in order to integrate the rate structures between these two territories, the Commission has often prescribed that the minima at the border points shall be the rates for one of the territories applicable to one of the gateway points in the group. *Minimum Rates on Hay and Straw*, 152 I. C. C. 355; *Watermelons From, To, and Between Southern Points*, 191 I. C. C. 435; *Cotton, Woolen, and Knitting Factory Products*, 211 I. C. C. 692, 220 I. C. C. 189; *North Carolina Corp. Comm.* v. *Akron, C. & Y. Ry. Co.*, 213 I. C. C. 259; *Commonwealth of Kentucky* v. *Ahnapee & W. Ry. Co.*, 213 I. C. C. 297, 268 I. C. C. 750; *East Tennessee Border Traffic Assn.* v. *Akron, C. & Y. Ry. Co.*, 214 I. C. C., 316, 268 I. C. C. 750; *Roxboro Broom Works* v. *Baltimore & O. R. Co.*, 215 I. C. C. 131; *B. Farris & Son* v. *Baltimore & O. R. Co.*, 226 I. C. C. 372.

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Following these adjustments, and in 1940, the Southern carriers, by exceptions filed to the Southern Classification, adopted lower classifications on less-than-carload and any quantity items in order to meet motor truck competition. This left the rate structure as such undisturbed, but by reclassification made lower effective class rates applicable to these types of shipments. The effect of this action was to remove the use of previously established hold points and minimum group rates to the boundary points on these types of traffic, although the minimum group rates previously prescribed on carload traffic remained in effect.[4] Thus, less-than-carload and any-quantity shipments moving interterritorially to the border points in Southern Territory took lower rates than the same types of shipments moving intraterritorially to and from border points in Official Territory. The temporary authority to continue this adjustment was revoked in 1946.

Passing over the intermediate steps which led to the adjustment prescribed in the orders here involved, we find that the Commission has now reestablished minimum group rates for the boundary points on all types of interterritorial traffic

[4] The Commission had granted temporary authority under Section 4 of the Act (49 U. S. C. § 4) so that the rail carriers could establish these rates in order to meet the rate competition from motor carriers. *Maximum Rates on Rail Traffic between North and South*, 273 I. C. C. 33, 35. The order was Fourth Section Order No. 14001, effective December 3, 1940.

subject to class rates, although the rates and the hold points are not in all instances the same as formerly. The changes were designed to make more equitable the complicated adjustment necessary, and the result is that all along the borders between the two territories cities which are gateways have been placed in defined groups, and interterritorial rates have been blanketed to them. Equality of rate treatment, and the elimination of violations of the Interstate Commerce Act, have in this way been secured. But, as the Commission pointed out (273 I. C. C. 33, 42), this adjustment, while more equitable, is temporary pending the complete and final adjustments in classifications and class rates ordered in the *Class Rate Investigation, 1939, supra.*

The plaintiff-appellant did not attack the orders in their entirety, but seeks to have declared invalid the fractional part which places Lynchburg and Danville, Virginia, in the same group. Lynchburg is located in Official Classification Territory, while Danville is in Southern Classification Territory, approximately 65 miles south of Lynchburg. Both are gateway or border points between the two territories. Were it not for the present rate orders, Danville would be entitled to lower rates on certain commodities from Official Territory than would Lynchburg, even though the latter is in Official Territory. For example, the first-class rate on shoes from New York to Lynchburg is 111 cents per

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one hundred pounds, while the first-class rate from New York to Danville is 120 cents per one hundred pounds. The result of the exceptions to the Southern Classification already described, was that the first-class 120-cent rate to Danville was reduced to a third-class 84-cent rate on shoes. The Official Territory lines did not take similar action, so that the Lynchburg rate remained at 111 cents. An obvious inequity to Lynchburg resulted. The Commission remedied this by prescribing as minima equal class rates to each locality, and placed them in a rate group for this purpose. Extensive changes in a temporary and delicate rate adjustment for the numerous similarly situated locations along the borders between these large territories was thus rendered unnecessary. As the whole rate adjustment is concerned, these minimum-rate orders are but an incident in a large-scale project, which the Lynchburg-Danville group adjustment is but a fraction of the incident.

The appellant's assignment of errors goes only to the scope of the Commission's power to prescribe identical minimum rates for a group of cities or gateways. There appears to be no issue as to the adequacy of the findings or the sufficiency of the evidence to support them, or of any irregularity in the procedure before the Commission or the District Court. The question is, then, under what conditions may the Commission prescribe minimum group rates.

The Commission's authority to prescribe identical rates for a group or an area has been frequently exercised and has been upheld. In *Commodity Rates on Lumber and Other Forest Products,* 165 I. C. C. 561, 565, 566, the Commission said:

> It is hardly necessary to say that the practice of grouping points of origin and destination and applying the same rate to all points within the group is an outstanding characteristic of the rate structure of the country. This practice has existed from the very beginning and in principle meets with general approval. Such grouping may be actuated in large part by commercial and competitive reasons, as in the case of the great citrus fruit and lumber blankets, or it may be resorted to merely for convenience and simplicity of rate publication. In a multitude of cases we have recognized its necessity and desirability.

This Court has affirmed the Commission's authority in this respect. In *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, it was said at page 486:

> Treating an area as a unit and applying a uniform blanket or group rate within it, as is the common practice with respect to switching rates, is within the competence of the Commission. See *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 138, Note 1, 141; *United States* v.

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Illinois Central R. Co., 263 U. S. 515, 518, Note 1; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 660, 664.

This well settled power to prescribe or approve rates on a group basis is found in those provisions of the Interstate Commerce Act which outlaw railroad freight rates which are unreasonable, unjustly discriminatory, unduly prejudicial or unreasonably preferential, as well as in those provisions of the Act forbidding lower charges for the transportation of a like kind of property over the same route for a longer than for a shorter distance, and authorizing the Commission to determine the rate which will clear the prohibitions of the Act.[5]

The determination by the Commission that the rate prescribed or approved is reasonable, nondiscriminatory, non-prejudicial, or non-preferential is a question of fact which is within the competence of the Commission to decide. *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, 206 U. S. 441, 454–455; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361; *Western Paper Makers' Chemical Company* v. *United States*, 271 U. S. 268, 271; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546; *New York* v. *United States*, 331 U. S. 284, 347. Such a determination is of course subject to judicial review in accordance with the

[5] 49 U. S. C. §§ 1 (4), 1 (5) (a), 2, 3 (1), 4 (1), 15 (1).

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[5] 49 U. S. C. §§ 1 (4), 1 (5) (a), 2, 3 (1), 4 (1), 15 (1).

customary standards. But here there is no assertion of irregularity, but only the question of the statutory power to prescribe minimum group rates in order to readjust a rate relationship from one of unequality to one of equality, a power which has been upheld, as has been shown. Thus the Commission has the authority to determine that a group rate is the appropriate solution to a problem of unreasonableness, unjust discrimination or undue prejudice.

Since it is clear that the Commission has the power to prescribe group rates to remove these prohibited results, it necessarily follows that it may do so in order to prevent violations of the long-and-short-haul provisions of the Act. Indeed, section 15 (1) of the Act specifically authorizes the Commission to prescribe rates for those which are "in violation of any of the provisions of this part." And the Commission has administrative discretion in the granting or withholding of relief under that prohibition. Further, if the Commission grants relief under the Fourth Section there results no violation of the prohibitions against discrimination or prejudice. *Intermountain Rate Cases,* 234 U. S. 476, 482–483, 485–486. Here the Commission found that the rates involved "are reasonable and otherwise lawful," a conclusion which obviously has a rational basis, and which is controlling under the estab-

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lished doctrine of administrative finality just discussed.[6]

The Commission's power to establish minimum rates is likewise clear. Section 15 (1) provides in part:

> That whenever, after full hearing, upon complaint * * *, or after full hearing

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[6] The legislative history of the Fourth Section is clear that the framers of the legislation did not intend to prohibit an equality of charges. The District Court refers to this in its opinion at pages 10–11:

"It is true that Section 4 (1) provides (following the long-haul, short-haul clause just quoted): '* * * but this shall not be construed as authorizing any common carrier * * * to charge or receive as great compensation for a shorter as for a longer distance * * *.' Senator Cullom, on January 10, 1887, in explaining this provision to the Senate, stated:

"'The declaration * * * does not in terms prohibit the charging as much for a shorter as for a longer distance, but simply withholds the legislative sanction from the making of such a charge. This qualifying clause negatives the inference that might possibly be drawn from the language of the section without these words, namely: that an equal charge for a shorter distance is authorized by inference because only a greater charge is prohibited. This qualification, therefore, leaves the question of whether an equal amount can be charged for the shorter distance to be determined by the provisions of the bill to which I have already referred, requiring all charges to be reasonable, and forbidding the giving of an unreasonable preference or advantage to any particular locality.' 18 Cong. Rec. 485.

"It is thus clear that the charging of the same rate to both Lynchburg and Danville is not violative of Section 4 of the Act, and that section leaves it to the Commission to determine whether such a rate is unreasonable or otherwise violative of other portions of the Act."

> under an order for investigation and hearing made by the Commission on its own initiative, * * *, the Commission shall be of opinion that any individual or joint rate, fare or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property * * *, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, * * *, or the maximum or minimum, * * *.

The language of the statute could not be more certain. And the power to prescribe a minimum rate has been several times upheld by the courts. *New York* v. *United States*, 331 U. S. 284, 345–347; *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476; *Scandrett* v. *United States*, 32 F. Supp. 995 (D. Oregon), affirmed 312 U. S. 661;[7] *Jefferson Island Salt Co.* v. *United States*, 6 F. (2d) 315, (N. D. Ohio).

The District Court found no violation of the law in the orders of the Commission which ad-

[7] At page 998, the three-judge District Court said (32 F. Supp. 995, 998):

"* * * the Commission is empowered to suspend such rates and fix minimum rates, if the proposed rates are unjust, unreasonable, unjustly discriminatory, unduly preferential, prejudicial, or violate some other applicable statute."

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justed these rates by increasing one to the level of the other. If this lawfully exercised power has resulted in removing some supposed advantage, the orders may not be held invalid, unless the result is one of unreasonableness, unjust discrimination, undue preference, or otherwise in the teeth of the regulatory statute. We have shown that the Commission had the power to take the action it did. While it is true that the Commission may not prescribe an unlawful rate structure, "this does not mean that the law compels identity of treatment for like services at different places. It prohibits only 'undue' or 'unreasonable' discriminations." *Board of Trade of Kansas City* v. *United States, supra,* at page 546. And continuing from this page of the opinion:

> Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * *, and upon which its decisions, made the basis of administrative orders operating *in futuro,* are not to be disturbed by the courts except upon a showing that they are unsupported by the evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481; see *Nashville, C. & St.*

L. Ry. v. *Tennessee,* 262 U. S. 318, 322; *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 352–53.

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.

It is plain that the Commission was required to act to remove the violations of law created by the classification adjustments which had taken place. It did so within its powers. That the decision reached through the exercise of informed judgment based upon the record made did not accord w.th appellant's desires, is not a ground for reversal. For, as the Court said in the *Board of Trade* case, just cited (p. 547), "Any solution had to rest on informed judgment.", and any action would adversely affect someone. Moreover, adjustments of this nature are not susceptible to "mathematical niceties", as the District Court observed. Danville's rate has been increased; it has not complained. Lynchburg's rate has been left undisturbed; it complains. But we submit that the situation presents no substantial question for this Court, for the power in the Commission to prescribe minimum group rates

to remove violations of the Act is plain. Since there is no other issue, it is respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General,

J. STANLEY PAYNE,
Associate Chief Counsel,
Interstate Commerce Commission.

SEPTEMBER 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949

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IN THE

Supreme Court of the United States

October Term, 1949

Case No. 363

LYNCHBURG TRAFFIC BUREAU,

PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, *et al.*,

DEFENDANTS-APPELLEES.

PETITION OF APPELLANT FOR REHEARING OF THIS PROCEEDING.

Comes now appellant in this proceeding, with humility, and respectfully beseeches this Honorable Court to grant a rehearing in this proceeding and to give us the privilege of further showing to this Court that the relief we seek should be granted because the orders of the Commission, we think, are contrary to law. The *per curiam* opinion indicates to us that we did not make our proposition clear and, since it is our desire for this Court to fully understand our proposition so the Court can relieve us of the burden cast upon us by the orders of the Commission in the considered proceedings, we are constrained, therefore, to humbly petition this Court for redress of our grievances. A comparison of what the Commission found

lawful in this proceeding with what the Commission found lawful in *Class Rate Investigation*, 1939, 262 I. C. C. 447 anw 264 I. C. C. 41 will show, we believe, that the relief we seek should be granted. The Commission, in *Class Rate Investigation*, 1939, 262 I. C. C. 447 and 264 I. C. C. 41, found that it is *lawful, just* and *reasonable* to charge Danville a first class rate of 137 cents and Lynchburg a first class rate of 128 cents to and from New York and that it is unlawful to charge equal rates at Danville and Lynchburg but the decision in this proceeding (273 I. C. C. 33) holds the contrary to be true, that it is just and reasonable to charge equal rates at Danville and Lynchburg to and from New York. Therefore, we are forced to ask this Court to rehear this proceeding for the purpose, among others, of determining, after rehearing, whether or not Section 15 (1) of the Act or any other provision of the Act, sustains and supports the orders of the Commission in this proceeding. If the Commission has the powers appellees claim, and the Court on rehearing so holds, the business interests of this city will then know exactly what to do. We shall now proceed to enlarge upon this subject with the hope that we will now make clear our proposition and that the desired relief will be given us.

METHOD OF WEIGHING.

When we purchase or sell gems, precious metals, and drugs, we know that we will receive and that we must give 12 ounces in each pound and we know when we purchase or sell all other commodities that we must receive and that we must give 16 ounces in each pound. Therefore, if you live in Chicago, Illinois, New York, N. Y., Danville, Virginia, or Lynchburg, Virginia, you know that 12 ounces are one pound of gems, precious metals and drugs and that 16 ounces are one pound of all other commodities. We know that these things are true because we are taught in school that the system of weight used all over America in weighing commodities is that 12 ounces make one pound of gems, precious metals and drugs, and that 16 ounces make one pound of all other commodities. Consequently, there is never any doubt about what is meant by one pound of gems, precious metals and drugs or by one pound of any of the other commodities. Nor should there

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be any doubt about how to tell whether or not a charge is reasonable, just, and lawful because Congress declared in the Interstate Commerce Act that all charges for service rendered or to be rendered in the transportation of property shall be, all over America, just and reasonable, that all unjust discrimination is unlawful, that all undue preference or undue prejudice is unlawful, and that it is unlawful to charge more for a shorter haul than for a longer haul (49 USCA 1 (5) (a), 2, 3, 4). Therefore, what are just, reasonable and otherwise lawful charges at Lynchburg, Danville, or at any other place, for transportation service must be measured by the same measuring stick, regardless of whether the destination or origin is Lynchburg, Danville, or elsewhere. Because Congress actually meant that the same system of weights must be used in weighing the lawfulness of the charges for transportation service at Lynchburg as the system used in weighing the lawfulness of the charges at Danville, New York, or elsewhere. Consequently, Congress did not mean that Lynchburg should be required to purchase transportation service on the basis of 12 ounces to the pound and that Danville, New York, Chicago, or other points, should be permitted to purchase the same commodity—transportation service—on the basis of 16 ounces to the pound. Congress actually meant that the same system of weights must be used in weighing the lawfulness of the charges for transportation service at Lynchburg as the system used in weighing the charges at Danville and that all peoples, cities, states, and communities are entitled to equal protection of the law and *to a uniform system of weighing transportation charges,* so even the most humble citizen can determine whether or not the charges are lawful.

The provisions of Sections 1, 2, 3, and 4 of the Act (49 USCA) dealing with the lawfulness of charges for transportation service do not provide that one system of weights can be used in weighing the lawfulness of charges for transportation service at Danville and another system used at Lynchburg. The law makes no exceptions for any person, place or time, as the law declares that all charges for transportation service for all *peoples, places and commodities* shall be just, reasonable, and lawful. Therefore, no exception should be made in weighing the charges for transportation service to

Lynchburg or Danville, and if no exceptions are used, then Lynchburg, under the law, is entitled to purchase transportation service upon the same system of weights as the system of weights used in weighing the lawfulness of the charges for transportation service to Danville or any other place. The Commission, under the purported authority of Section 15 (1) of the Act, has used one system in weighing the charges at Lynchburg and another system in weighing the charges at Danville, which unequal treatment causes us to come back to this Honorable Court for relief.

It is our opinion of the law that the Commission must use 16 ounces or 12 ounces to the pound at Lynchburg, Danville or elsewhere and that a pound of transportation service is not lawfully 12 ounces at Lynchburg and 16 ounces at Danville or elsewhere. Consequently, since the report and orders of the Commission here considered give Danville 16 ounces and Lynchburg 12 ounces to the pound, those orders are *per se* unlawful. The orders of the Commission here considered are not unlawful because we claim they are unlawful, but because the Commission holds that *unequal* treatment of Lynchburg and Danville is unlawful. (See 262 I. C. C. 447.) Therefore, for the reasons herein assigned, this proceeding should be reheard.

THE MEASURING STICK.

We have claimed that holding the rate to Lynchburg as the minimum rate at Danville is actually giving Lynchburg only 12 ounces of transportation service for one pound and actually giving Danville 16 ounces of transportation service for a pound. Our contention that a uniform measuring stick is proper is adequately supported by decisions of the Commission in which decisions the Commission is *measuring* or *weighing* transportation service and fixing the charge therefor based solely upon *shortline distance* between the origin and destination. Applying that measuring stick—distance—in determining the charge to Danville and Lynchburg, we come up with a rate of 120 cents on shoes between New York and Danville and 111 cents between New York and Lynchburg. But applying the method the Commission used in this proceeding, we come up with a rate of 111 cents at Danville and 111 cents at Lynchburg to and from New York. The Commission

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condemned the method it used in this proceeding because the Commission, in fixing class rates at Danville and at Lynchburg to and from points in Official territory, including New York, at page 701 of 262 I. C. C. 447, *Class Rate Investigation*, 1939, said:

> "The rates herein prescribed are to be applied *to the distance* over the shortest possible rail routes by which carload traffic can be interchanged between carriers without transfer of lading." (Emphasis supplied.)

That system of weighing transportation service (using the *distance* over the shortest rail routes) was employed by the Commission in *Eastern Class Rate Investigation*, 164 I. C. C. 314, and in that proceeding, the Commission prescribed a first class rate of 111 cents between New York and Lynchburg for "rate-making distance of 400 to 420 miles" and that same system was used in *North Carolina Corporation Commission* v. *A. C. & Y.*, 213 I.C.C. 259, where the Commission prescribed a first class rate of 120 cents between New York and Danville for "rate-making distance of 460 to 480 miles."

Then, in *Class Rate Investigation*, 1939, 262 I.C.C. 447, the Commission prescribed for application between points in Official territory, including New York and Lynchburg, and between points in Official territory, including New York and points in Southern territory, including Danville, a mileage scale of class rates, as shown in Appendix 10 of 262 I.C.C. 447 (766) and for the rate-making distance between New York and Danville of 460 to 480 miles, the Commission fixed a first class rate of 137 cents and 128 cents between New York and Lynchburg for rate-making distance of 400 to 420 miles. These three decisions conclusively prove that Danville and Lynchburg are never entitled to equal rates, such as the Commission has approved in this proceeding, to and from points in Official territory, as the difference in *distance* is such that it is impossible to prescribe equal rates to both points without creating unlawful rates at one or the other point—hence minimum rates are unlawful when measured by the formula the Commission fixed to determine lawful rates at Danville and Lynchburg.

INCONSISTENT ACTION

We are here complaining because the Commission in the proceeding here considered, 273 I.C.C. 33, has given Lynchburg only 12 ounces for one pound of transportation service and has given Danville and other points in Southern territory 16 ounces for one pound of transportation service. It is claimed that Section 15 (1) of the Act (49 USCA 15 (1)) will permit the Commission to give Lynchburg only 12 ounces of transportation service for one pound and to give Danville 16 ounces of transportation service for one pound. For years prior to September 1, 1940, the date the rail carriers reduced the Classification ratings on 3500 Classification items, Lynchburg, on those 3500 items, was given 16 ounces of transportation service for one pound and Danville was given 16 ounces of transportation service for one pound, as the Classification ratings on each article to both Lynchburg and Danville were the same and the rates to Danville were made upon the distance to Danville and the rates to Lynchburg were made upon the distance to Lynchburg. However, the Commission, in this proceeding, is permitting the carriers to disregard unity in Classification ratings at Danville and Lynchburg and to disregard the system (the only equitable one) of using the distance from origin to destination in weighing transportation service. The ends of justice, from where we sit, are not being met by disregarding unity in Classification ratings and by not using the distance from origin to destination in determining rates. The Commission is permitting Danville to purchase transportation service based upon a rate determined by using the distance to Lynchburg rather than by using the distance to Danville, which method of unequal treatment of Lynchburg and Danville results in a first class rate of 111 cents at Danville instead of a rate of 120 cents but the Commission is requiring Lynchburg to purchase transportation service based upon the distance to and from Lynchburg and New York, resulting in a first class rate of 111 cents. Therefore, it is obvious that Lynchburg is not receiving 16 ounces of transportation service in each pound if Danville is receiving 16 ounces of transportation service for a pound.

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PRIOR DECISION OF THE COMMISSION PROVES THE ORDERS HERE ARE UNLAWFUL

The favoritism and undue preference and prejudice created by giving Lynchburg only 12 ounces of transportation service for one pound and giving Danville 16 ounces of transportation service for one pound, cannot be sustained under the provisions of Section 15 (1) of the Act (49 USCA 15 (1)) as that section and paragraph refer to *level of rates* (maximum or minimum or maximum and minimum level of rates) rather than referring to the right of the Commission to group Danville and Lynchburg so as to give Danville 16 ounces of transportation service for one pound and Lynchburg only 12 ounces for a pound. The orders of the Commission in the proceeding here under consideration, since they hold the rate to Lynchburg as the minimum rate at Danville, create unjust discrimination, undue preference and prejudice because holding the rate to Lynchburg as the minimum rate at Danville gives Danville 16 ounces of transportation service for a pound and gives Lynchburg only 12 ounces of transportation service for a pound. This conclusion is true, as Danville gets 464 miles of transportation service for 111 cents, when, for that distance, the rate should be 120 cents, and Lynchburg only gets 401 miles of transportation service for 111 cents, which is the prescribed rate for that distance. Our contention that Section 15 (1) authorizes maximum or minimum or maximum and minimum *level of rates* rather than being authority for the grouping of Lynchburg and Danville into one group, is affirmed by the Commission in *Class Rate Investigation*, 1939, 264 I.C.C. 41, where at page 61, the Commission said:

> "In requiring an increase in rates to remove unlawfulness we are not required first to find that existing rates, or proposed reduced rates initiated by carriers, are not compensatory. See *Petroleum Between Washington, Oregon, Idaho, Montana*, 234 I.C.C. 609. We found in that proceeding that certain proposed reduced rates were compensatory, considering all costs, but that they were below a *minimum reasonable level* and hence unlawful. The order in that proceeding was sustained in *Scandrett* v.

United States, 32 Fed. Supp. 995, and the judgment was affirmed by the United States Supreme Court in 312 U. S. 661. See also *Jefferson Island Salt Mining Co.* v. *United States*, 6 Fed. (2d) 315." (Emphasis supplied).

Section 15 (1) of the Act (49 USCA 15 (1)) can only be used to remove unlawful charges but never used for the purpose of creating, *for the first time or at any time, unlawful charges*. Consequently, inasmuch as unlawful charges are created by the proceeding here considered in that Danville receives 16 ounces of transportation service for one pound and Lynchburg receives only 12 ounces of transportation service for one pound, the orders must be set aside as they are contrary to the reports of the Commission in 262 I.C.C. 447 and 264 I.C.C. 41.

There can be no question about the unlawfulness of the minimum rates the Commission prescribed in the proceeding here considered and that the use of those minimum charges is unlawful, as the unlawfulness of those minimum rates has been made crystal clear by the Commission in *Class Rate Investigation*, 1939, 262 I.C.C. 447. At page 509 of 262 I.C.C. 447, the Commission said:

> "Upon the record, therefore, we find: (1) That the present Official, Illinois, Southern, and Western Classifications, insofar as the ratings named therein are concerned, as a whole, are, and for the future will be unjust and unreasonable in violation of Section 1(4) and (6) of the Act; and (2) That the several Classifications named in finding 1, insofar as the ratings therein are concerned, as a whole, *because of the substantial number of differences in such ratings that now exist result and will result in the future, in undue and unreasonable preference, advantage, prejudice, and disadvantage as between shippers and receivers of freight in interstate commerce and as between territories in violation of Section 3 (1) of the Act.*" (Emphasis supplied.)

Here, in the quoted provisions of 262 I.C.C. 447, the Commission has found that the differences in Classification ratings between the ratings applicable on traffic moving to Lynchburg and the rating applicable on the same traffic moving to Dan-

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ville result and will result in the future in undue and unreasonable preference, advantage, prejudice and disadvantage as between shippers and receivers of freight in interstate commerce (Lynchburg and Danville) and as between territories (Official and Southern) in violation of Sections 3 (1) of the Act. Now the difference in the Classification rating at Lynchburg and at Danville is the only reason for minimum rates and that statement is true because in *Minimum Rates on Rail Traffic Between the North and the South,* 273 I.C.C. 33 (the proceeding we are here considering), at page 41 thereof, the Commission said:

> "A comparison of rates under the proposed adjustment between representative points in central and southern territories shows that, class for class, no difficulties are experienced with the proposed hold points but *when comparing so-called mismatched classes, for example, third class in southern and first or second class in official, minimum charges on less-than-carload and any-quantity traffic, as well as on carload traffic, are necessary.*" (Emphasis supplied).

The *existence of mismatched classes,* for example, first class on clothing from New York to Lynchburg and third class on clothing from New York to Danville, was condemned by the Commission as being unlawful at page 509 of 262 I.C.C. 447, *Class Rate Investigation,* 1939, and in that proceeding, the Commission directed the carriers to bring about unity in Classification ratings. But, in this proceeding, (273 I.C.C. 33) the Commission has authorized the carriers to maintain *mismatched classes,* that is third class on clothing moving to Danville and first class on clothing moving to Lynchburg, the kind of mismatched classes the Commission found unlawful in 262 I.C.C. 447 (509) and for the purpose of continuing in effect mismatched classes, the Commission has authorized the carriers to apply the rates to Lynchburg as the minimum rates at Danville, thus giving Danville 16 ounces of transportation service for one pound and giving Lynchburg only 12 ounces of transportation service for one pound. The decision in this proceeding (273 I.C.C. 33) is unlawful or else the decision in 262 I.C.C. 447 is unlawful, as they both cannot be correct because they are in conflict with each other. This

Honorable Court should rehear the proceeding and remove the conflict that exists in 262 I.C.C. 447 and 273 I.C.C. 33.

Not only are the report and orders in the proceeding here considered (273 I.C.C. 33) unlawful because they sanction and authorize the maintenance of mismatched classes, contrary to the finding of unlawfulness made by the Commission in 262 I.C.C. 447 (509) but they are also unlawful because they authorize the application of the rates to Lynchburg as the minimum rates at Danville, which rates to Lynchburg the Commission has found to be unlawful (264 I.C.C. 41). The fact that the rates to Lynchburg are to be applied at Danville as the minimum rates at Danville conclusively shows that the report and orders in this proceeding (273 I.C.C. 33) are unlawful because the Commission, in speaking of the rates to and from Lynchburg and points in Official territory, at page 62 or 264 I.C.C. 41, *Class Rate Investigation*, said:

> "We are convinced from the evidence in these proceedings that the present class rates within official and Illinois territories are below a just and reasonable level and should be increased as a part of the adjustment, to remove the unlawfulness in such rates, in respect of both their unreasonably low level and their unduly preferential character. We are of the opinion that our findings as to those rates are sufficiently stated in the prior report, but to remove any doubt, we find that the class rates within official and Illinois territories are less than just and reasonable rates, with the exceptions as stated in the prior report and in this report, and therefore, unlawful, as well as unlawful because of their unduly preferential character, as more fully stated in the prior report."

Notwithstanding the fact that the Commission found unlawful the disunity in Classification ratings to Danville and Lynchburg, and the class rates to Lynchburg, nevertheless, the Commission, in this proceeding, 273 I.C.C. 33, at page 43, said:

> "We find: 2. That proposed minimum less-than-carload and any-quantity class rates for application on interterritorial traffic between southern and official territories are just and reasonable *."

Now, how can the Commission lawfully hold that the rates to Lynchburg are just and reasonable minimum rates at Danville when the Commission found that the rates to Lynchburg are unlawful (262 I.C.C. 447 and 264 I.C.C. 41), and if those rates are unlawful at Lynchburg, by what method of reasoning can those rates be made reasonable and just at Danville? Then, too, how can the Commission hold mismatched classes reasonable and just in this proceeding and hold mismatched classes unlawful in 262 I.C.C. 447, (509), *Class Rate Investigation,* 1939?

Prior to September 1, 1940, Lynchburg and Danville, on 3500 Classification items, were receiving 16 ounces of transportation service for one pound as to the level of rates and uniformity in ratings, but effective on that date, the rail carriers, with the blessings of the Commission, reduced the Classification ratings on 3500 Classification items on traffic moving between points in Official territory and points in Southern territory. The effect of the reduced Classification ratings was, as an example, to reduce the rate on shoes, clothing, etc., from first class of 120 cents to third class of 84 cents between New York and Danville and to continue in effect the first class rate on shoes, clothing, etc., of 111 cents between New York and Lynchburg. Therefore, since Danville is 64 miles south of Lynchburg and since the 84 cent rate is lower than the 111 cent rate to Lynchburg, unlawful rates were created and that unlawfulness is sought to be corrected by minimum rates but giving equal rates to Danville and Lynchburg when equal rates are not proper to Danville and Lynchburg, only continues unlawful rates in effect and adds to the upset. Consequently, since Lynchburg, prior to September 1, 1940, had a rate of 111 cents and Danville had a rate of 120 cents, the establishment of a rate of 84 cents at Danville created undue preference and prejudice and holding the rate to Lynchburg as the minimum rate at Danville only continues unlawful rates. The Commission found, at page 509 of 262 I.C.C. 447 that such mismatched classes result in undue and unreasonable preference, advantage, prejudice and disadvantage as between shippers and receivers of freight in interstate commerce (Lynchburg and Danville) and as between Classification territories (Official and Southern) in violation of Section 3 (1) of the

Act. Therefore, since minimum charges have been used to continue in effect disunity or the lack of uniformity in Classification ratings on traffic moving to Lynchburg and Danville to and from points in Official territory, and since the Commission has ruled that disunity or the lack of uniformity in Classification ratings results in undue preference and prejudice between shippers and receivers of freight (Lynchburg and Danville) and between Classification territories (Official and Southern), the report and orders of the Commission here considered establish unlawful charges. Now the authority of the Commission under Section 15 (1) of the Act permits the Commission to prescribe maximum or minimum or maximum and minimum charges only when unlawful charges are found to exist, but *that authority is not to be used to create, establish, or continue in effect unlawful charges.* Consequently, since disunity in Classification ratings existing between Lynchburg and Danville is unlawful and so found by the Commission and, since minimum charges are used to create, establish and continue undue preference and prejudice, those charges are unlawful and those charges cannot be established under the provisions of Section 15 (1) of the Act (49 USCA 15 (1)).

The maintenance of a third class Classification rating on clothing, as an example of many commodities, resulting in a rate of 84 cents on shipments moving between New York and Danville and the maintenance of a first class Classification rating on clothing, resulting in a rate of 111 cents on shipments moving between New York and Lynchburg, results in undue preference and prejudice to shippers and receivers at Danville and Lynchburg and between Official territory and Southern territory, as the Commission has found that such unequal Classification ratings at Lynchburg and Danville are unlawful (see 262 I. C. C. 447 (509)). Consequently, that finding of undue preference and prejudice conclusively proves, as a matter of law, that the orders of the Commission in this proceeding are unlawful as those orders permit the carriers to continue in effect unequal Classification ratings, ratings that the Commission has found to be unlawful. Therefore, since unequal Classification ratings are unlawful, the orders of the Commission in this proceeding must fail, as Section 15 (1) of

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the Act permits unlawful charges to be removed but that authority cannot be used to create and continue in effect ratings and charges the Commission found unlawful. The unequal Classification ratings to Danville and Lynchburg, which unequal ratings have caused the establishment of minimum charges, cannot be *unlawful* in *Class Rate Investigation,* 1939, 262 I.C.C. 447 (509) and still be *lawful and just* in this proceeding (273 I.C.C. 33). Therefore, one or the other of these decisions of the Commission is wrong and for that reason, among others, this Honorable Court should grant a rehearing as prayed. There is no authority, in law, to support, or sustain the orders issued by the Interstate Commerce Commission in the proceeding here considered. But, unless this Honorable Court grants our prayer for rehearing and then reverses the orders, a great injustice will be done. We think that justice requires a rehearing and we know the burden should be removed.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU

By: W. G. BURNETTE,
Counsel.

1104-5 Peoples National Bank Building
Lynchburg, Virginia
November 30, 1949.

CERTIFICATE OF COUNSEL

This is to certify that this petition for rehearing is filed in good faith and not for delay and that the petition is restricted to the grounds available to petitioner but not previously presented.

W. G. BURNETTE.

CERTIFICATE OF SERVICE

This is to certify that I, W. G. Burnette, Counsel for the Lynchburg Traffic Bureau, have served a copy of the petition for rehearing of Case No. 363, upon: Gerald L. Phelps, Esquire, Phillip B. Perlman, Esquire, Edward Dumbauld, Esquire, and Herbert A. Bergson, Esquire, Department of Justice, Washington, D. C.; Daniel W. Knowlton, Esquire, and J. Stanley Payne, Esquire, Interstate Commerce Commission, Washington, D. C.; Howard C. Gilmer, Esquire, United States Attorney, Roanoke, Virginia; D. Lynch Younger, Esquire, Norfolk and Western Railway Company, Roanoke, Virginia; Paul V. Miller, Esquire, Pennsylvania Railroad Company, Philadelphia, Pennsylvania; and Frank H. Cole, Esquire, Baltimore and Ohio Railroad Company, Cincinnati, Ohio, by mailing to each said party at the named address, by United States Registered Mail, a copy thereof properly addressed, with prepaid postage.

Proof of service of the petition for rehearing is filed with the Clerk of the Supreme Court of the United States (see registered mail receipt attached to the original petition filed with the Clerk).

Dated at Lynchburg, Virginia, this 30th day of November, 1949, and served on this date.

W. G. BURNETTE.

1104-5 Peoples National Bank Building
Lynchburg, Virginia
November 30, 1949.

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No. 363. LYNCHBURG TRAFFIC BUREAU *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Virginia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *W. G. Burnette* for appellant. *Solicitor General Perlman* and *J. Stanley Payne* for the United States and the Interstate Commerce Commission, appellees. Reported below: 84 F. Supp. 1012.

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